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IN THE

Supreme Court of the United States

October Term, 1961

No. 272

WILLIAM I. COHEN,

Petitioner,

v.

PLATEAU NATURAL GAS COMPANY, DRILLERS GAS COMPANY, PAUL KITCH AND VULCAN MATERIALS COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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v.

PLATEAU NATURAL GAS COMPANY, DRILLERS GAS COMPANY, PAUL KITCH AND VULCAN MATERIALS COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WILLIAM I. COHEN, on behalf of himself and on behalf of all other stockholders of Vulcan Materials Company prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit, entered on the 1st day of May, 1962. The judgment dismissed an appeal from a judgment of the United States District Court for the District of Kansas which granted defendants' motions for summary judgment dismissing the complaint.

No appeal had been taken within the 30 days after the entry of the judgment and the time to appeal had been extended by the District Court pursuant to Rule 73(a) of the Rules of Civil Procedure. The extension of time was granted *ex parte*.

The respondents moved to dismiss the appeal on two grounds:

1. On the ground that the order extending the time to appeal under Rule 73(a) of the Rules of Civil Procedure was void *ab initio* because under Rule 6(b)(2) notice of the application for an extension of time should have been given to the respondents; and

2 .There was no "showing of excusable neglect" as required by Rule 73(a).

The motions came on to be heard on June 8, 1961 and were denied by the Court of Appeals by an order entered on June 10, 1961.

Motions to dismiss the appeal were again made on the 27th day of March, 1962, when the case appeared on the calendar for hearing of the appeal upon the merits and the motions were granted on May 1, 1962 by a new panel of judges of which only one of the judges of the previous panel was a member.

The Court granted the second motions to dismiss on the ground that the order extending the time to appeal was void *ab initio* because of the failure of the appellant to give notice of the application for an extension of time which the Court of Appeals held was required by Rule 6(b)(2) of the Rules of Civil Procedure. It cited in support of its decision *North Umberland Mining Company* v. *Standard Accident Insurance Company* (9 Cir. 1952), 193 F. 2d 951.

The Court also expressed doubt as to the showing of excusable neglect. However, it based its decision on the failure of petitioner to give notice of the application for an extension of time in which to appeal.

Opinions Below

There was no opinion of the United States Court of Appeals denying the first motions to dismiss the appeal. A copy of the order dated June 10, 1961 is contained in the certified record and is appended to this petition at page 10.

The opinion granting the second motion to dismiss the appeal is not reported. A copy is contained in the certified record and is appended to this petition at pages 11-13.

Jurisdiction

The judgment of the United States Court of Appeals for the Tenth Circuit was entered and dated May 1, 1962.

Jurisdiction to review this case is found in 28 U. S. C. 1254.

Questions Presented

1. Is Rule 6(b)(1) or (2) of the Rules of Civil Procedure applicable to an application for an extension of time to appeal pursuant to Rule 73(a) of the Rules of Civil Procedure?

2. Must notice of an application for an extension of time to appeal pursuant to Rule 73(a) be given or may it be granted *ex parte*?

3. May a District Court extend the time to appeal before the expiration of the original 30 days after the entry of judgment?

4. Does a United States Court of Appeals lack jurisdiction to hear an appeal taken pursuant to an order

extending the time to appeal if the order extending the time to appeal was granted *ex parte*?

5. Is there "a showing of excusable neglect" under Rule 73(a) if the local attorney appointed to satisfy the rules of the District Court receives notice of the entry of the judgment but does not communicate the information to the actual, principal and out of the state attorney who was in active charge of the case for the party and said real attorney of the party does not learn of the entry of the judgment until after the expiration of the original 30 days after the entry of the judgment?

Statement

This is a stockholders derivative action brought in the right of Vulcan Materials Company. The action was brought in the United States District Court for the District of Kansas.

On January 10, 1961 the District Court (Huxman, J.) granted motions for summary judgment dismissing the complaint which judgment was entered on the 11th day of January, 1961. The principal attorney for the plaintiff, the petitioner herein, is Nathan B. Kogan, a member of the New York State Bar with offices in New York City. As required by the rules of the District Court, Orval L. Fisher of the Kansas Bar with offices in Wichita, Kansas, was appointed as local attorney for the plaintiff.

Notice of the entry of the judgment was given to Orval L. Fisher by the Clerk of the District Court but he (Fisher) did not communicate that information to Mr. Kogan or his associate, David M. Palley, and neither Mr. Kogan nor his associate, David M. Palley, learned of the entry of the judgment within the 30 days. Mr. Kogan and Mr. Palley

learned of the entry of the judgment after the expiration of the time in which to appeal and Mr. Palley, Mr. Kogan then being out of the State of New York, made application for an extension of time for appeal under Rule 73(a). That application was made *ex parte* on Mr. Palley's affidavit, sworn to March 2, 1961, and at Mr. Palley's request was submitted by Mr. Fisher to Chief Judge Delmas Hill. Judge Hill submitted the application to Judge Huxman, who granted the application on March 8, 1961 and pursuant thereto a notice of appeal was served and filed.

Appended to this petition at pages 14 and 15 are the order of Huxman, J., and the affidavit of David M. Palley, upon which the order was granted.

Motions for reconsideration of, and to vacate the order extending the time to appeal were made in the District Court but were denied because of the lack of jurisdiction.

Motions to dismiss the appeal were thereafter made in the United States Court of Appeals for the Tenth Circuit. The motions came on for hearing before Circuit Judges Phillips, Pickett and Lewis on June 8, 1961 and were denied without opinion by order dated June 10, 1961.

That order contains no leave to renew (page 10).

No motion was made for reargument.

The appeal came on for hearing upon the merits on March 27, 1962 before Chief Judge Murrah and Circuit Judges Lewis and Breitenstein. At that time motions to dismiss the appeal were again made.

On May 1, 1962 that panel of the Court granted the motions on the ground that the order extending the time to appeal, having been granted *ex parte*, it was therefore void *ab initio* and the Court was without jurisdiction to consider the case upon the merits.

Reasons For Granting the Writ

We have here a conflict between two panels of the same court. Only one of the members of the first panel, which unanimously denied the motions to dismiss, was a member of the second panel, namely, Circuit Judge Lewis.

This cause presents two Rules of Civil Procedure, namely, Rule 6(b) and Rule 73(a) as to which confusion exists and which require clarification by this Court.

From a perusal of Rule 6(b) and Rule 73(a), it is quite manifest that 6(b) does not apply to Rule 73(a). The statement by the Court of Appeals (the second panel) which relied on *North Umberland Mining Company* v. *Standard Accident Insurance Company*, 193 F. 2d 951 (9 Cir., 1952), that Rule 6(b) does apply, is erroneous.

Rule 6(b) must either be applicable in its entirety to an extension of time to appeal under Rule 73(a), or it is not applicable at all.

Rule 6(b) is divided into two subdivisions:

Subdivision "1" governs the enlargement of time "before the expiration of the period originally prescribed", and subdivision "2" governs enlargement of time after expiration of such period.

The right to appeal, and the extension of time to appeal, however, are governed by Rule 73(a). Rule 73(a) provides for filing a notice of appeal within the first thirty days following entry of judgment and further provides for the granting of a thirty-day extension of time to file the notice of appeal on a "showing of excusable neglect based on a failure of a party to learn of the entry of the judgment". Under Rule 73(a), the District Court may *not* extend or enlarge the time to appeal *before* the expiration of the original thirty-day period within which an appeal can be taken. The right to extend or enlarge the

time to appeal may be exercised only *after* the expiration of the thirty-day period, and upon a showing of "excusable neglect", for a failure to learn of the entry of judgment.

There has been and there can be no neglect, excusable or otherwise, until the time to appeal has expired. (*Conway* v. *Pennsylvania Greyhound Lines, Inc.* [Ct. of App. D. C. 1957] 243 F. 2d 39.)

In the *North Umberland* Case, the Court, in its opinion declares as follows:

> "* * * Had the request for enlargement of the time been made before the expiration of that period the court would have been empowered to order the enlargement 'with or without motion or notice.' But since it was made after expiration of the period, that is to say at a time when the movant was already in default, the court was without authority to act ex parte; it might proceed only upon motion and after notice of hearing served on the party or parties affected. Such is the unmistakable import of Rule 6(b) and (d); and there is nothing anywhere in the Rules or in the nature of the proceeding itself suggestive of a contrary interpretation. * * *"

The Court, in effect, by that statement impliedly declares that an application for an extension of time to appeal can be made *before there is a neglect* and before the expiration of the time to appeal.

This is incorrect. In effect it is a decisional amendment of Rule 73(a).

The extension of time is dependent upon a "neglect" and there can be no "neglect" during the time within which the act may be performed. It is only when the time

has expired and the act has not been performed before the expiration of the time that there is a neglect.

The very language, meaning and operation of Rule 6(b) and Rule 73(a) establish that they are incompatible, independent, and have no relation to each other.

Almost all District Courts require that actions brought by out of state attorneys have associated with them local counsel.

Pursuant to the requirement of Rule III(6) of the United States District Court for the District of Kansas, Orval Fisher of Wichita, Kansas was appointed local counsel.

Notice of the entry of judgment was given to him, but he did not communicate the information to Mr. Kogan, the principal attorney who had active charge of the case, and Mr. Kogan did not learn of the entry of the judgment until after the expiration of the 30 days in which to appeal.

In *Resnick* v. *Lehigh Valley Railroad Company* (D. C. S. D. N. Y., 1951), 11 F. R. D. 76, the Court held that the failure of the attorney who had active charge of the case to learn of the entry of judgment within the 30 days after the entry thereof was "excusable neglect" within the meaning and purview of Rule 73(a) and granted an order extending the time to appeal. In his opinion in that case Weinfeld, D. J., said as follows:

> "The court is of the opinion that the plaintiff should not be deprived of an opportunity to appeal from the adverse judgment by reason of the confusion which appears to have existed between the attorney of record and trial counsel with respect to the notice of entry of judgment and the expiration date for the filing of a timely appeal. Trial counsel who was in active charge of the matter

states that he did not receive notice of entry of the judgment until December 27th, 1950, after the time to appeal had expired, whereupon he promptly secured the order to show cause for the relief requested herein. There is no claim that the attorney of record did not receive the notice of entry of judgment, which was entered on November 1st, 1950. The court finds that upon all the facts there is a showing of excusable neglect."

However, the opinion of Judge Weinfeld is not shared by other courts, including, apparently, the United States Court of Appeals, Tenth Circuit, which expressed doubt in the matter.

This question—whether a party should be deprived of his right to appeal because of the failure of his attorney, who has active charge of the case, to learn of the entry of the judgment because of the culpable neglect of local counsel to keep the attorney in active charge of the case informed, should be reviewed by this Court.

We respectfully submit that the phrase "a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment", contained in Rule 73(a), requires interpretation by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

NATHAN B. KOGAN,
Of New York, N. Y.,
Counsel for Petitioner.

DAVID M. PALLEY,
Of New York, N. Y.,
Of Counsel.

Order of Court of Appeals Denying Motions to Dismiss Appeal

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Before HONORABLE ORIE L. PHILLIPS, HONORABLE JOHN C. PICKETT AND HONORABLE DAVID T. LEWIS, Circuit Judges.

WILLIAM I. COHEN,

Appellant,

vs.

6713

PLATEAU NATURAL GAS COMPANY et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

This cause came on to be heard on the motions of Plateau Natural Gas Company and Drillers Gas Company, Vulcan Materials Company and Paul R. Kitch to dismiss the appeal herein.

On consideration whereof, it is now here ordered that the said motions be and the same are hereby denied.

(Entered June 10, 1961)

Opinion of United States Court of Appeals Tenth Circuit

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 6713

WILLIAM I. COHEN,

Appellant,

vs.

PLATEAU NATURAL GAS COMPANY, DRILLERS GAS COMPANY, PAUL KITCH AND VULCAN MATERIALS COMPANY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

DAVID M. PALLEY for Appellant.

RICHARD F. MULLINS for Appellee, Plateau Natural Gas Company and Drillers Gas Company.

FRANK H. McFADDEN for Appellee, Vulcan Materials Company.

Before MURRAH, Chief Judge, and LEWIS and BREITENSTEIN, Circuit Judges.

Per Curiam

This is an appeal from a summary judgment entered against Appellant in his stockholders' derivative action against Appellees.

Upon the filing of the notice of appeal, Appellees moved for dismissal on the ground that the notice was untimely. We denied the motion without prejudice to renewal at time of argument on the merits.

The summary judgment was entered on January 11, 1961. The record shows that a copy of the journal entry of judgment was received by Appellant's local counsel of record in Wichita, Kansas forthwith, and the records of the District Court Clerk show that notice and copies of the journal entry of judgment were mailed to all of the attorneys of record, including David M. Palley, Appellant's chief counsel in New York City, New York. No attempt to appeal was made by Appellant within the thirty-day period provided by Rule 73(a), Federal Rules of Civil Procedure but on March 8, 1961, after the time for appeal had expired, Mr. Palley filed an affidavit asking the trial court to extend the time for appeal on the ground that he had not received notice of the entry of judgment. On that date, the trial court issued an ex parte order extending the time to appeal for thirty days and Appellant's notice of appeal was filed within the extended time. Appellees' motion in the trial court to set aside the order extending the time to appeal was denied on the basis that the filing of the notice of appeal had divested that Court's jurisdiction.

Under these circumstances, it is extremely doubtful whether, as a matter of law, the "excusable neglect" contemplated by Rule 73(a) was present. See: Nichols-Morris Corporation v. Morris (2 Cir.) 279 F. 2d 81. In any event, since the motion in the form of an affidavit for an extension of time in which to appeal was not made

within the initial thirty days allowed by Rule 73(a), the trial court was without power to act without giving notice to all adverse parties. See: Rules 6(b), (d), Federal Rules of Civil Procedure; and North Umberland Mining Company v. Standard Accident Insurance Company (3 Cir.) 193 F. 2d 951. The trial court's ex parte order extending the time for appeal was therefore void ab initio, and Appellant's subsequent notice of appeal was untimely and insufficient to vest this Court with jurisdiction of the appeal. Cf. Sutherland v. Fitzgerald (10 Cir.) 291 F. 2d 846.

Accordingly, the appeal is dismissed.

Order Extending Time to Appeal

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

Civil Action No. W-1517

WILLIAM I. COHEN,

Plaintiff,

AGAINST

PLATEAU NATURAL GAS COMPANY, DRILLERS GAS COMPANY, PAUL KITCH AND VULCAN MATERIALS COMPANY,

Defendants.

Upon the annexed affidavit of David M. Palley sworn to the 2nd day of March, 1961, it is

ORDERED, that the time of the plaintiff, William I. Cohen to file a Notice of Appeal and the Bond be and the same is hereby extended to and including the 12th day of March, 1961.

s/ WALTER A. HUXMAN
Judge of United States District Court
For the District of Kansas

Filed
Mar. 8, 1961

CHARLES A. CAHILL
Clerk

by EUGENIA RUDY
Deputy

Affidavit of David M. Palley For Extension of Time to Appeal

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

Civil Action No. W-1517

WILLIAM I. COHEN,

Plaintiff,

AGAINST

PLATEAU NATURAL GAS COMPANY, DRILLERS GAS COMPANY, PAUL KITCH AND VULCAN MATERIALS COMPANY,

Defendants.

State of New York
County of New York—ss.:

DAVID M. PALLEY being duly sworn, deposes and says:

I am of counsel for the plaintiff in the above entitled action and I am familiar with the facts hereinafter set forth. I personally argued in opposition to the motion for summary judgment:

On February 16, 1961, we received a copy of an order dated February 14, 1961 ordering that all exhibits introduced in evidence in the above entitled action shall be withdrawn from the Office of the Clerk within fifteen (15) days. We did not understand the nature of the order and wrote to Mr. Orval L. Fisher, our Wichita counsel, inquiring with respect to the facts in the matter. At that time, neither Mr. Kogan or myself knew that the motion for summary judgment had been granted and that a judgment had been entered on January 11, 1961.

I did not learn of the entry of the judgment of January 11th until we had received a letter from Mr. Fisher dated February 20th. The letter was received by us on or about February 23, 1961. At that time, plaintiff's time to appeal had expired.

I received a letter from Mr. Crawley, Deputy Clerk dated February 28th, 1961, in which he said that a copy of the Opinion and Journal Entry of the judgment were mailed to all counsel of record on January 11th, 1961, the date they were filed. With the Clerk's letter of February 28th, 1961, I received a copy of the Opinion and a copy of the Judgment.

I wish to state that no such papers were received either by Mr. Kogan or myself and we did not have knowledge of the entry of the judgment until the receipt of the letter of Mr. Fisher. The first copies of the opinion and the judgment that we have ever seen or received were those enclosed with the lettr of February 28th.

Plaintiff desires to appeal and would have served a Notice of Appeal within thirty (30) days after the entry of the judgment had we been notified of the judgment. Under the circumstances, I am submitting herewith in behalf of the plaintiff a Notice of Appeal, together with the necessary Bond and respectfully ask that this Court grant an extension of time for the filing of said Notice pursuant to Section 2107 of the Judiciary and Judicial Procedure Act.

DAVID M. PALLEY

Sworn to before me this
2nd day of March, 1961.

ROSE BROOKS
Notary Public,
State of New York
No. 24-5466625
Qualified in Kings County
Commission expires March 30, 1962